

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Feb 03, 2022**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CHRISTOPHER B.,

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

NO: 2:20-CV-00481-LRS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 18, 20. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Chad L. Hatfield. Defendant is

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<sup>1</sup>Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 represented by Special Assistant United States Attorney Jeffrey E. Stables. The  
2 Court, having reviewed the administrative record and the parties' briefing, is fully  
3 informed. For the reasons discussed below, the Court **GRANTS, in part,**  
4 Plaintiff's Motion for Summary Judgment, ECF No. 18, **DENIES** Defendant's  
5 Motion for Summary Judgment, ECF No. 20, and **REMANDS** the case for to the  
6 Commissioner for additional proceedings.

### 7 JURISDICTION

8 Plaintiff Christopher B.<sup>2</sup> filed an application for Supplemental Security  
9 Income (SSI) on July 24, 2018, Tr. 83, alleging disability since June 1, 2017, Tr.  
10 172, due to restless leg syndrome, insomnia, joint pain, spine injury, limited range  
11 of motion in his neck, memory issues, depression, and anxiety, Tr. 203. Benefits  
12 were denied initially, Tr. 103-11, and upon reconsideration, Tr. 115-21. A hearing  
13 before Administrative Law Judge Jesse K. Shumway ("ALJ") was conducted on  
14 July 8, 2020. Tr. 36-68. Plaintiff was represented by counsel and testified at the  
15 hearing. *Id.* Plaintiff amended his alleged onset date to April 7, 2018. Tr. 39.  
16 The ALJ also took the testimony of medical expert Stephen Rubin and vocational  
17 expert Jeff Cockrum. Tr. 36-68. The ALJ denied benefits on July 28, 2020. Tr.

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18 <sup>2</sup>In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's  
19 first name and last initial, and, subsequently, Plaintiff's first name only, throughout  
20 this decision.  
21

1 20-31. The Appeals Council denied Plaintiff's request for review on February 27,  
2 2017. Tr. 1-3. Therefore, the ALJ's decision became in the final decision of the  
3 Commissioner. The matter is now before this Court pursuant to 42 U.S.C. §  
4 405(g). ECF No. 1.

### 5 **BACKGROUND**

6 The facts of the case are set forth in the administrative hearing and  
7 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner.  
8 Only the most pertinent facts are summarized here.

9 Plaintiff was 46 years old at the amended alleged date of onset. Tr. 171. He  
10 completed his GED in 1994. Tr. 204. Plaintiff's reported work history includes  
11 jobs in as a customer service representative, dishwasher, and security guard. Tr.  
12 204. At application, he stated that he stopped working on June 1, 2017, due to his  
13 conditions. Tr. 204.

14 Plaintiff was assaulted by three or four men on April 7, 2018. Tr. 304. The  
15 attack resulted in a left frontal bone fracture, a left orbital wall fracture, a left  
16 ethmoid fracture, nasal fractures, and a traumatic brain injury (TBI). Tr. 304, 306.  
17 Plaintiff's amended onset date reflects the date of the attack.

### 18 **STANDARD OF REVIEW**

19 A district court's review of a final decision of the Commissioner of Social  
20 Security is governed by 42 U.S.C. §§ 405(g), 1383(c). The scope of review under  
21 § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not

1 supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698  
2 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence  
3 that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at  
4 1159 (quotation and citation omitted). Stated differently, substantial evidence  
5 equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.*  
6 (quotation and citation omitted). In determining whether the standard has been  
7 satisfied, a reviewing court must consider the entire record as a whole rather than  
8 searching for supporting evidence in isolation. *Id.*

9 In reviewing a denial of benefits, a district court may not substitute its  
10 judgment for that of the Commissioner. “The court will uphold the ALJ’s  
11 conclusion when the evidence is susceptible to more than one rational  
12 interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).  
13 Further, a district court will not reverse an ALJ’s decision on account of an error  
14 that is harmless. *Id.* An error is harmless where it is “inconsequential to the  
15 [ALJ’s] ultimate nondisability determination.” *Id.* (quotation and citation omitted).  
16 The party appealing the ALJ’s decision generally bears the burden of establishing  
17 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

### 18 FIVE-STEP EVALUATION PROCESS

19 A claimant must satisfy two conditions to be considered “disabled” within  
20 the meaning of the Social Security Act. First, the claimant must be “unable to  
21 engage in any substantial gainful activity by reason of any medically determinable

1 physical or mental impairment which can be expected to result in death or which  
2 has lasted or can be expected to last for a continuous period of not less than twelve  
3 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
4 impairment must be “of such severity that he is not only unable to do his previous  
5 work[,] but cannot, considering his age, education, and work experience, engage in  
6 any other kind of substantial gainful work which exists in the national economy.”  
7 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

8 The Commissioner has established a five-step sequential analysis to  
9 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §  
10 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work  
11 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial  
12 gainful activity,” the Commissioner must find that the claimant is not disabled. 20  
13 C.F.R. § 416.920(b).

14 If the claimant is not engaged in substantial gainful activity, the analysis  
15 proceeds to step two. At this step, the Commissioner considers the severity of the  
16 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from  
17 “any impairment or combination of impairments which significantly limits [his]  
18 physical or mental ability to do basic work activities,” the analysis proceeds to step  
19 three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy this  
20 severity threshold, however, the Commissioner must find that the claimant is not  
21 disabled. 20 C.F.R. § 416.920(c).

1           At step three, the Commissioner compares the claimant's impairment to  
2 severe impairments recognized by the Commissioner to be so severe as to preclude  
3 a person from engaging in substantial gainful activity. 20 C.F.R. §  
4 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the  
5 enumerated impairments, the Commissioner must find the claimant disabled and  
6 award benefits. 20 C.F.R. § 416.20(d).

7           If the severity of the claimant's impairment does not meet or exceed the  
8 severity of the enumerated impairments, the Commissioner must pause to assess  
9 the claimant's "residual functional capacity." Residual functional capacity  
10 ("RFC"), defined generally as the claimant's ability to perform physical and  
11 mental work activities on a sustained basis despite his or her limitations, 20 C.F.R.  
12 § 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

13           At step four, the Commissioner considers whether, in view of the claimant's  
14 RFC, the claimant is capable of performing work that he or she has performed in  
15 the past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is  
16 capable of performing past relevant work, the Commissioner must find that the  
17 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of  
18 performing such work, the analysis proceeds to step five.

19           At step five, the Commissioner considers whether, in view of the claimant's  
20 RFC, the claimant is capable of performing other work in the national economy.  
21 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner

1 must also consider vocational factors such as the claimant's age, education, and  
2 past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of  
3 adjusting to other work, the Commissioner must find that the claimant is not  
4 disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of adjusting to  
5 other work, analysis concludes with a finding that the claimant is disabled and is  
6 therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

7 The claimant bears the burden of proof at steps one through four. *Tackett v.*  
8 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,  
9 the burden shifts to the Commissioner to establish that (1) the claimant is capable  
10 of performing other work; and (2) such work "exists in significant numbers in the  
11 national economy." 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386,  
12 389 (9th Cir. 2012).

### 13 THE ALJ'S FINDINGS

14 At step one, the ALJ found that Plaintiff had not engaged in substantial  
15 gainful activity since the date of application, July 24, 2018. Tr. 22. At step two,  
16 the ALJ found that Plaintiff had the following severe impairments: closed head  
17 injury; mild neurocognitive disorder; anxiety disorder; posttraumatic stress  
18 disorder (PTSD); cannabis use disorder; cervical degenerative disc disease; and left  
19 AC joint separation. Tr. 22. At step three, the ALJ found that Plaintiff did not  
20 have an impairment or combination of impairments that meets or medically equals  
21 the severity of a listed impairment. Tr. 23. The ALJ then found that Plaintiff had

1 the RFC to perform a full range of medium work as defined in 20 C.F.R. §  
2 416.967(c) with the following limitations:

3 he can occasionally climb ladders, ropes, and scaffolds, and frequently  
4 climb ramps and stairs; he can occasionally reach overhead with the left  
5 upper extremity; he cannot have concentrated exposure to extreme cold  
6 or vibration, and he can have no exposure to hazards (e.g., unprotected  
7 heights, moving mechanical parts); he is limited to simple, routine,  
8 repetitive tasks; and he needs a routine, predictable work environment  
9 with no more than occasional changes and no assembly-line pace or  
10 other fast-paced work.

11 Tr. 24. The ALJ made no step four determination. Tr. 30. At step five, the ALJ  
12 found that considering Plaintiff's age, education, work experience, and RFC, there  
13 were other jobs that exist in significant numbers in the national economy that  
14 Plaintiff could perform, including electrical accessories assembler I, laundry  
15 worker II, and routing clerk. Tr. 30. The ALJ concluded that Plaintiff was not  
16 under a disability, as defined in the Social Security Act, from the date of  
17 application, July 24, 2018, through the date of the decision. Tr. 31.

## 18 ISSUES

19 Plaintiff seeks judicial review of the Commissioner's final decision denying  
20 him SSI benefits under Title XVI of the Social Security Act. ECF No. 18.

21 Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly evaluated Plaintiff's symptom statements;
2. Whether the ALJ properly addressed the medical opinion evidence;
3. Whether the ALJ made a proper step three determination; and

1 4. Whether the ALJ made a proper step five determination.

## 2 DISCUSSION

### 3 1. Plaintiff's Symptom Statements

4 Plaintiff argues that the ALJ erred in the treatment of his symptom  
5 statements. ECF No. 18 at 16-20.

6 An ALJ engages in a two-step analysis when evaluating a claimant's  
7 testimony regarding subjective pain or symptoms. "First, the ALJ must determine  
8 whether the claimant has presented objective medical evidence of an underlying  
9 impairment which could reasonably be expected to produce the pain or other  
10 symptoms alleged." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). "The  
11 claimant is not required to show that his impairment could reasonably be expected  
12 to cause the severity of the symptom he has alleged; he need only show that it  
13 could reasonably have caused some degree of the symptom." *Id.*

14 Second, "[i]f the claimant meets the first test and there is no evidence of  
15 malingering, the ALJ can only reject the claimant's testimony about the severity of  
16 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the  
17 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal  
18 citations and quotations omitted).

19 The ALJ stated that Plaintiff's "statements concerning the intensity,  
20 persistence and limiting effects of these symptoms are not entirely consistent with  
21 the medical evidence and other evidence in the record for the reasons explained in

1 this decision.” Tr. 25-26. Specifically, the ALJ provided four reasons for rejecting  
2 Plaintiff’s symptom statements: (1) Plaintiff’s daily activities was inconsistent with  
3 his allegations; (2) the objective medical evidence was inconsistent with his  
4 allegations; (3) Plaintiff’s course of treatment undermined his allegations; and (4)  
5 Plaintiff’s limited work history raised the question of whether his unemployment is  
6 attributed to his medical impairments. Tr. 25-27.

7 The ALJ’s first reason for rejecting Plaintiff’s testimony, that it was not  
8 supported by his daily activities, is not specific, clear and convincing. A  
9 claimant’s daily activities may support an adverse credibility finding if (1) the  
10 claimant’s activities contradict his other testimony, or (2) “the claimant is able to  
11 spend a substantial part of his day engaged in pursuits involving performance of  
12 physical functions that are transferable to a work setting.” *Orn v. Astrue*, 495 F.3d  
13 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).  
14 A claimant need not be “utterly incapacitated” to be eligible for benefits. *Fair*, 885  
15 F.2d at 603. Here, the ALJ found that Plaintiff’s ability to care for his dogs, play  
16 games on a tablet, clean his home, and assist an elderly woman with chores was  
17 inconsistent with his allegations. Tr. 25, 27. The Ninth Circuit has warned ALJs  
18 against using simple household activities against a person when evaluating their  
19 testimony:

20 We have repeatedly warned that ALJs must be especially cautious in  
21 concluding that daily activities are inconsistent with testimony about  
pain, because impairments that would unquestionably preclude work

1 and all the pressures of a workplace environment will often be  
2 consistent with doing more than merely resting in bed all day.

3 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014). Here, Plaintiff's ability to  
4 care for his pets, play games on electronic devices, and perform household chores  
5 are not sufficient to support the ALJ's determination.

6 The ALJ's second reason for rejecting Plaintiff's symptom statements, that  
7 they were not supported by objective evidence, is not specific, clear and  
8 convincing. Objective medical evidence is a "relevant factor in determining the  
9 severity of the claimant's pain and its disabling effects," but it cannot serve as the  
10 only reason for rejecting a claimant's credibility. *Rollins v. Massanari*, 261 F.3d  
11 853, 857 (9th Cir. 2001). Here, the ALJ repeatedly points to objective evidence  
12 and statements to providers throughout the record as support for finding. Tr. 26-  
13 27. However, the other reasons the ALJ provided for rejecting Plaintiff's symptom  
14 statements fails to meet the specific, clear and convincing standard. Therefore, any  
15 inconsistency with the objective medical evidence alone is not enough to support  
16 the ALJ's determination. *See* S.S.R. 16-3p ("Symptoms cannot always be  
17 measured objectively through clinical or laboratory diagnostic techniques.").

18 Furthermore, the ALJ disregarded the objective medical evidence that  
19 supported Plaintiff's allegations: "I recognize that the consultative psychological  
20 examination did find memory and cognitive deficits, but this exam took place only  
21 7 months after his assault (i.e., when further healing from his head injury would

1 still be expected), and later mental status exams were within normal limits.” Tr.  
2 27. On November 3, 2018, Dr. Wiarda performed multiple cognitive testing that  
3 demonstrated substantial limitations including low scores on the WMS-IV in  
4 auditory, immediate, and logical memory, Tr. 559, and low scores on the Trails A  
5 and B tests, Tr. 560. At the hearing, when Dr. Rubin was asked about potential  
6 improvement since the testing, he stated that “[h]e hasn’t been re-tested and it  
7 certainly hasn’t been any kind of objective evidence at this point that would either  
8 contradict or support the earlier testing,” and he “might” have experienced some  
9 additional recovery. Tr. 47. Therefore, rejecting Plaintiff’s statements based on  
10 improvement without actual evidence of improvement is an error.

11 The ALJ’s third reason for rejecting Plaintiff’s symptom statements, that his  
12 course of treatment undermined his allegations, is not specific, clear and  
13 convincing. Conservative treatment can be “sufficient to discount a claimant’s  
14 testimony regarding [the] severity of an impairment.” *Parra v. Astrue*, 481 F.3d  
15 742, 751 (9th Cir. 2007). Likewise, noncompliance with medical care or  
16 unexplained or inadequately explained reasons for failing to seek medical  
17 treatment cast doubt on a claimant’s subjective complaints. 20 C.F.R. § 416.930;  
18 *Fair*, 885 F.2d at 603. To support his finding, the ALJ points to evidence that  
19 Plaintiff sought routine and periodic medication management for his psychological  
20 issues, did not seek significant or ongoing counseling/treatment, and only reported  
21 mild to moderate depression and anxiety symptoms. Tr. 26. Likewise, the ALJ

1 also found that Plaintiff missed his physical therapy appointment and then failed to  
2 restart treatment. Tr. 26. However, the Ninth Circuit has found that “it is a  
3 questionable practice to chastise one with a mental impairment for the exercise of  
4 poor judgment in seeking rehabilitation.” *Nguyen v. Chater*, 100 F.3d 1462, 1465  
5 (9th Cir. 1996). Here, Plaintiff has suffered a TBI, which testing shows has  
6 affected his memory. Tr. 559. Additionally, the ALJ found anxiety and PTSD to  
7 be severe impairments at step two. Tr. 22. Therefore, under *Nguyen* this does not  
8 meet the specific, clear and convincing standard.

9       The ALJ’s fourth reason for rejecting Plaintiff’s symptom statements, that  
10 his limited work history raises questions regarding his willingness to work, is not  
11 specific, clear and convincing. Finding that claimant had limited work history and  
12 “has shown little propensity to work in [his] lifetime” is a specific, clear, and  
13 convincing reasons for discounting the claimant’s testimony. *Thomas v. Barnhart*,  
14 278 F.3d 947, 959 (9th Cir. 2002). Here, the ALJ failed to make any finding that  
15 Plaintiff had shown “little propensity” to work in his lifetime. Instead, he stated  
16 that “I also note that the claimant has a very limited work history, which raises a  
17 question as to whether his continuing unemployment is actually attributable to  
18 medical impairments.” Tr. 27. Raising the question is not an affirmative finding  
19 that Plaintiff had “little propensity” to work. The ALJ did not inquire about  
20 Plaintiff’s limited work history at the hearing. Tr. 38-43, 50-59. Therefore, this  
21 comment by the ALJ does not rise to the level of specific, clear and convincing

1 standard.

2 In conclusion, the ALJ has failed to provide a specific, clear and convincing  
3 reason to reject Plaintiff's symptom statements. Therefore, the case is remanded  
4 for the ALJ to readdress Plaintiff's statements.

## 5 **2. Medical Opinion Evidence**

6 Plaintiff challenges the ALJ's treatment of the medical opinions of Nicholas  
7 R. Wiarda, Psy.D., Stephen Rubin, Ph.D., and Arthur Flores, PAC. ECF No. 18 at  
8 7-14.

9 For claims filed on or after March 27, 2017, new regulations apply that  
10 change the framework for how an ALJ must weigh medical opinion evidence.  
11 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL  
12 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new  
13 regulations provide that the ALJ will no longer give any specific evidentiary  
14 weight to medical opinions or prior administrative medical findings, including  
15 those from treating medical sources. 20 C.F.R. § 416.920c(a). Instead, the ALJ  
16 will consider the persuasiveness of each medical opinion and prior administrative  
17 medical finding, regardless of whether the medical source is an Acceptable  
18 Medical Source. 20 C.F.R. § 416.920c(c). The ALJ is required to consider  
19 multiple factors, including supportability, consistency, the source's relationship  
20 with the claimant, any specialization of the source, and other factors (such as the  
21 source's familiarity with other evidence in the file or an understanding of Social

1 Security's disability program). *Id.* The regulations emphasize that the  
2 supportability and consistency of the opinion are the most important factors, and  
3 the ALJ must articulate how he considered those factors in determining the  
4 persuasiveness of each medical opinion or prior administrative medical finding. 20  
5 C.F.R. § 416.920c(b). The ALJ may explain how he considered the other factors,  
6 but is not required to do so, except in cases where two or more opinions are equally  
7 well-supported and consistent with the record. *Id.*

8 Supportability and consistency are further explained in the regulations:

9 (1) *Supportability*. The more relevant the objective medical evidence  
10 and supporting explanations presented by a medical source are to  
11 support his or her medical opinion(s) or prior administrative medical  
finding(s), the more persuasive the medical opinions or prior  
administrative medical finding(s) will be.

12 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
13 administrative medical finding(s) is with the evidence from other  
14 medical sources and nonmedical sources in the claim, the more  
persuasive the medical opinion(s) or prior administrative medical  
finding(s) will be.

15 20 C.F.R. § 416.920c(c).<sup>3</sup>

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17  
18 <sup>3</sup>The parties disagree over whether Ninth Circuit case law continues to be  
19 controlling in light of the amended regulations, specifically whether an ALJ is still  
20 required to provide specific and legitimate reasons for discounting a contradicted  
21 opinion from a treating or examining physician. ECF Nos. 20 at 9-12, 21 at 1-2.

1           **A.     Nicholas R. Wiarda, Psy.D.**

2           On November 3, 2018, Dr. Wiarda completed a psychological evaluation of  
3 Plaintiff. Tr. 556-68. This evaluation the administration of the WMS-IV, which  
4 showed an impaired rating in auditory memory and logical memory I and II,  
5 borderline rating in immediate memory, verbal paired associates I, and a low  
6 average rating in verbal paired associates II, and visual reproduction II. Tr. 559.  
7 Additionally, the Trails B test showed Plaintiff in the fifth percentile. Tr. 560. Dr.  
8 Wiarda made the following medical source statement:

9           There appears to be a deterioration or decompensation in the claimant's  
10 ability to work with regard to the chief complaint reported today.  
11 Specifically, he sustained a TBI and is demonstrating significant  
12 deficits. Claimant demonstrated the ability to reason and clearly make  
13 decisions between better and worse options. He was able to carry out  
14 a 3-step direction. There was observed impairment in understanding  
15 and memory, specifically problems with auditory and delayed memory.  
16 Claimant demonstrated impairment in sustained concentration and  
17 pacing throughout the examination as evidenced by a borderline score  
18 on Trails B which measures complex attention. That score, in  
19 particular, may be more sensitive to marijuana abuse and poor sleep  
20 which has been continuous for this claimant. Claimant demonstrated  
21 social improvement through an inability to sustain a long-term, mature  
relationship and communicate with supervisors effectively to meet his  
needs. He demonstrated difficulty adapting to new tasks or  
environments as shown by problems maintaining a job and may need  
compensatory measure to assist him. Or note, he can recognize but not  
recall previously learned information and with proper supports, his  
visual memory may be a relative strength.

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19           The Court finds resolution of this question unnecessary to the disposition of this  
20 case.  
21

Tr. 561. The ALJ found this medical source statement only somewhat persuasive, “but no quantification is given for most of the limitations,” and rejected the opinion because the testing was only seven months after Plaintiff’s TBI. Tr. 28. Regardless of the specificity of the opinion, the ALJ’s reason for finding it only somewhat persuasive, was not supported by substantial evidence. Here, the ALJ focuses on the potential for Plaintiff’s improvement as a reason to reject to opinion for the same reasons he used to reject the test results. Again, there is no evidence of improvement. Dr. Rubin’s testimony was only that there “might” have been improvement, but acknowledged that there was no evidence of improvement. Tr. 47. Here, there is not sufficient evidence to support a finding of improvement. Therefore, this does not properly negate the supportability or the consistency of the opinion.

Before, the ALJ could conclude that Plaintiff has experienced improvement in his memory, he should have ordered an additional consultative evaluation that included re-testing. Absent evidence of improvement, the ALJ’s rationale is not supported by the substantial evidence. Therefore, upon remand, the ALJ will supplement the record with re-testing and readdressing Dr. Wiarda’s opinion.

**B. Stephen Rubin, Ph.D. and Arthur Flores, PAC**

Plaintiff also challenged the ALJ’s treatment of the opinions from Dr. Rubin and physician assistant Flores. ECF No. 18 at 11-14. However, since the ALJ is to send Plaintiff for re-testing upon remand, these opinions will need to be readdressed

1 on remand as well.

2 **3. Step Three**

3 Plaintiff challenged the ALJ's step three determination based on the ALJ's  
4 treatment of Dr. Rubin's opinion. ECF No. 18 at 14-16.

5 If a claimant has an impairment or combination of impairments that meets or  
6 equals a condition outlined in the "Listing of Impairments," then the claimant is  
7 presumed disabled at step three, and the ALJ need not to consider his age,  
8 education, and work experience. 20 C.F.R. § 416.920(d). An ALJ must evaluate  
9 the relevant evidence before concluding that a claimant's impairments do not meet  
10 or equal a listed impairment. *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001).

11 The ALJ considered listings 12.02, 12.04, 12.06, and 12.15 and found that  
12 Plaintiff had only mild to moderate limitations in the "paragraph B" criteria,  
13 including moderate limitations in understanding, remembering, or applying  
14 information. Tr. 23. In doing so, the ALJ found that Plaintiff "did have some  
15 testing results showing impaired cognition approximately 7 months after his  
16 assault, but later exams showed intact memory and mental status within normal  
17 limitations." Tr. 23. As discussed above, the medical expert testified that there  
18 was no evidence to contradict the testing. Tr. 47. This case is being remanded for  
19 the ALJ to send Plaintiff for a consultative evaluation that would include re-testing.  
20 Therefore, the ALJ will be required to make a new step three determination  
21 following Plaintiff's re-testing.

1     **4.     Step Five**

2             Plaintiff challenges the ALJ's step five determination. ECF No. 18 at 20.  
3     Furthermore, the Court notes that the ALJ failed to make a step four determination.  
4     This case is remanded for the ALJ to gather additional evidence in the form of re-  
5     testing Plaintiff's cogitative abilities, readdressing his symptom statements, and  
6     readdressing the medical opinions in the record. Therefore, if, on remand, the ALJ  
7     does not find Plaintiff eligible at step three, the ALJ is required to make a new  
8     determination at steps four and five.

9                             **CONCLUSION**

10            Plaintiff requests that the Court remand the case for an immediate award of  
11   benefits. ECF No. 18 at 21.

12            The decision whether to remand for further proceedings or reverse and  
13   award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
14   888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
15   where "no useful purpose would be served by further administrative proceedings,  
16   or where the record has been thoroughly developed," *Varney v. Sec'y of Health &*  
17   *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by  
18   remand would be "unduly burdensome[.]" *Terry v. Sullivan*, 903 F.2d 1273, 1280  
19   (9th Cir. 1990). This policy is based on the "need to expedite disability claims."  
20   *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be  
21   resolved before a determination can be made, and it is not clear from the record

1 that the ALJ would be required to find a claimant disabled if all the evidence were  
2 properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587,  
3 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

4 The Court finds that further administrative proceedings are appropriate. *See*  
5 *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)  
6 (remand for benefits is not appropriate when further administrative proceedings  
7 would serve a useful purpose). The ALJ is required to send Plaintiff out for a  
8 consultative evaluation to re-test Plaintiff's cognitive abilities. Additionally, the  
9 ALJ must properly address Plaintiff's symptom statements, readdress the medical  
10 opinions, and make new determinations at steps three, four, and five. The ALJ will  
11 take the testimony of a vocational expert at any remand proceedings.

12 **ACCORDINGLY, IT IS HEREBY ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment, ECF No. 18, is **GRANTED**,  
14 **in part**, and the matter is **REMANDED** to the Commissioner for  
15 additional proceedings consistent with this Order.

16 2. Defendant's Motion for Summary Judgment, ECF No. 20, is **DENIED**.

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1           **IT IS SO ORDERED.** The District Court Clerk is directed to enter this  
2 Order and provide copies to counsel. Judgment shall be entered for Plaintiff and the  
3 file shall be **CLOSED**.

4           **DATED** February 3, 2022.

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8 LONNY R. SUKO  
9 Senior United States District Judge  
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